

83617-5

Supreme Court No. ~~83671-5~~
(Court of Appeals No. 37089-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TYRONE D. FORD,

Respondent.

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STATE OF WASHINGTON
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**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
The Honorable John Wulle**

RESPONDENT'S SUPPLEMENTAL BRIEF

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A. ISSUE ADDRESSED IN SUPPLEMENTAL BRIEF

1. Did the Court of Appeals properly hold that the trial court coerced the jury to return a guilty verdict on count one, rape of a child in the second degree?

B. SUPPLEMENTAL STATEMENT OF THE CASE

After listening to two days of testimony, a Clark County jury retired to deliberate on two charges: rape of a child in the second degree (count one) and rape of a child in the third degree (count two). CP 19, 36, 37. II RP at 58. The charges alleged that Mr. Ford, who was in his early 20's, had sexual intercourse with L.A.K. once when she was 13 years old (count one) and again when she was 14 years old (count two). CP 19. During her testimony, L.A.K. described the two acts succinctly. First act: "We had intercourse. He stuck his privates in my privates." III-A RP at 139. Second act: "He took off my pants and grabbed my arms and put them over my head, and he held me down and proceeded to have intercourse with me." III-A RP at 140.

To aid in their deliberation, the court instructed the jury on the law. Instruction No. 1 told the jury, "You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof." CP 21. The instructions go on to encourage the jury to reach a unanimous verdict. "As jurors, you have a duty to discuss the case

with one another and to deliberate in an effort to reach a unanimous verdict.” CP 24 (Instruction 2). And,

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 27, 31 (Instructions 7 and 9).

And finally,

You must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

CP 35 (Instruction 13).

But the court also instructed the jury that they could return a verdict without reaching a unanimous verdict.

INSTRUCTION NO. 12

There are allegations that the defendant committed acts of Rape of a Child in the Second Degree and Rape of a Child in the Third Degree on Separate occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. *You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.*

(emphasis added). CP 34.

As noted above, L.A.K. testified to two separate acts, once when she was 13 years old, and the other time when she was 14 years old.

After two days of testimony, the jury deliberated from 7:47 p.m. until 2:01 p.m. the next day. VI RP at 433. (See supplemental designation of clerk's papers, sub. number 45, clerk's trial minutes). The trial court asked the presiding juror if the jury had reached a unanimous verdict. The presiding juror responded, "Yes." IV RP at 389-90. The trial court began reading the verdict form, stating that the jury found Mr. Ford guilty of third degree rape of a child on count two. The trial court reviewed the documents and called an unrecorded sidebar. Even though the jury was instructed that it could return a "non-unanimous" verdict (see Instruction 12), the trial court stated, "I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in." IV RP at 390.

While the jury was out, the trial judge, the judge who had listened to the evidence, saw the jurors respond to the evidence, and knew that the jury engaged in a lengthy deliberation, audibly speculated about the blank verdict form on count one:

THE COURT: I'm of the opinion that one of two things has happened. They have forgotten to fill in the form. Or in the alternative, they have reached a decision that either means they

were deadlocked on Count One or that they reached a not guilty finding on Count One.

IV RP at 391.

Four to five minutes later, the jury returned with a written guilty verdict on count one. VI RP at 434; CP 36. The presiding juror told the court that it was a unanimous verdict. IV RP at 391-92. The record indicates that the jury was polled. IV RP 392. The record does not indicate what the judge asked or how the jurors responded to the polling. IV RP at 392.

There were no post-trial motions with respect to the verdict or how the verdict was reached.

On appeal, Mr. Ford argued several issues only one of which, the coerced verdict, is at issue here. In a split decision, Judges Bridgewater and Armstrong held that the trial court committed reversible error when it gave the deliberating jury an oral unanimity instruction in conflict with the written jury instructions. (“The trial court’s instruction to the jury directly conflicted with the trial court’s jury instructions[.]” Court of Appeals decision at page 7.) Because the error was a manifest error affecting a constitutional right, the error could be raised for the first time on appeal. The majority reversed and remanded count one to the trial court. Judge Hunt authored a dissenting opinion disagreeing with the majority’s

conclusion that there was manifest error subject to review for the first time on appeal.

The state did not file a motion for reconsideration to the Court of Appeals. Instead, the state filed a Motion for Discretionary Review by simply reiterating the issue as presented in its Brief of Respondent. This Court accepted review on February 10, 2010.

C. SUPPLEMENTAL ARGUMENT

1. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT'S INTERFERENCE WITH THE DELIBERATING JURY WAS A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT AND COULD BE RAISED FOR THE FIRST TIME ON APPEAL.

In general, appellate courts will not consider issues raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). But an aggrieved defendant can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926; RAP 2.5(a)(3). The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. State v. King, 167 Wn.2d 324, 329, 219 P.3d 642, 645 (2009); Kirkman, 159 Wn.2d at 926-27.

Here, Mr. Ford did not receive a fair trial. He should be allowed to complain about the unfairness for the first time on appeal. It was unfair when the trial court gave the jury a written instruction telling them that they could return a non-unanimous verdict. But then when the jury did so, the court insisted that the jury change their verdict to guilty or not guilty. Based on the record, the court coerced the jury to change its verdict from non-unanimous to guilty. And that unfairness denied Mr. Ford a fair trial.

According to well-established case law, juries are presumed to follow the instructions provided. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006); State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). As such, in Mr. Ford's case, when the jury returned with a verdict with one count filled in with "guilty" and the other count left blank, it should be presumed that the jury was following the court's instructions. The specific instruction the jury followed was Instruction No. 12 which reads,

There are allegations that the defendant committed acts of Rape of a Child in the Second Degree and Rape of a Child in the Third Degree on Separate occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which acts or acts have been proved beyond a reasonable doubt. *You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.*

(emphasis added). CP 34.

Given this instruction, the jury's verdict makes sense: unanimous for guilt on count two, and unable to unanimously agree on count one. The state presented evidence of only two acts of unlawful sexual intercourse between Mr. Ford and L.A.K. In L.A.K.'s own words: First act: "We had intercourse. He stuck his privates in my privates." III-A RP at 139. Second act: "He took off my pants and grabbed my arms and put them over my head, and he held me down and proceeded to have intercourse with me." III-A RP at 140. The jury was not obliged to unanimously agree or disagree that both these acts occurred as L.A.K. described them.

After the presiding juror told the bailiff that the jury had reached a verdict, the jury was brought into the courtroom. IV RP at 389. The judge asked the presiding juror to rise. The judge asked the presiding juror if the jury had reached a unanimous verdict, and the presiding juror said, "Yes."¹ IV RP at 390. The two verdict forms were passed to the judge. This is what happened as the court read the verdict forms:

THE COURT: We, the jury, find the defendant, Tyrone Ford, guilty of the crime of Rape of a Child in the Third Degree as charged in Count Two.

(Pause; reviewing documents.) Gentlemen, sidebar.

¹ As argued above, the presiding juror saying that the jury had reached a unanimous verdict is perfectly consistent with the verdict reached. The jury had, after all, reached "a unanimous verdict" on count two.

(Bench conference; not recorded)

THE COURT: I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. *It must be filled in.*

(Jurors exit courtroom.)

IV RP at 390.

The jury returned with a guilty verdict on count one a long four to five minutes later. VI RP at 433.

By giving the jury no choice but to change it non-unanimous verdict on count one to a guilty or not guilty verdict, the trial court violated CrR 6.15(f)(2) and improperly coerced the jury into reaching a verdict. CrR 6.15(f)(2) states: "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." This rule's purpose is to prevent judicial interference with the deliberative process. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978).

To prevail on a claim of improper judicial interference with the verdict, this Court requires that a defendant establish "a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." State v. Watkins, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983). Mr. Ford has done that. The circumstances of the jury's

verdict establishes that the verdict was improperly influenced by the trial court's intervention.

After a long second day of trial, the jury retired to deliberate at 7:47 p.m. It wasn't until 2:01 p.m. the next day that the jury returned, consistent with the court's written instructions, with the non-unanimous verdict on count one and the unanimous verdict on count two. The trial court immediately sent the jury out to change its non-unanimous verdict on count one to a unanimous verdict. ("Verdict form No. 1 is completely blank. It must be filled in." IV RP at 390). Four to five minutes later, the jury was back, having changed its non-unanimous verdict to a unanimous guilty. There's only one possibility why that occurred in light of the facts of this case: the jury was improperly influenced by the trial court's intervention. This possibility is both reasonable and substantial.

The jury deliberated for a long time. After following the trial court's written instructions, it returned an appropriate non-unanimous verdict. The court sent the jury back out to fill in the verdict form for count one. While the jury was out, the judge speculated that anything was possible - either the jury had forgotten to fill out the verdict form, or they were deadlocked, or they reached a not guilty verdict. IV 4RP at 390-91. But had the jury only forgotten to fill out the verdict form for count one, the oversight would have been corrected in a matter of seconds. Instead,

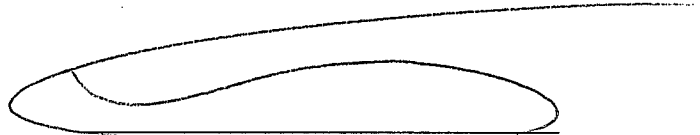
the jury returned to the jury room and talked for four to five minutes.

What did the jury have to talk about? The only rational explanation is that pressure was brought to bear on a holdout juror our jurors who, having read the instructions, believed that a non-unanimous verdict was a proper verdict.

D. CONCLUSION

This Court should affirm the Court of Appeals and remand for retrial on count one.

Respectfully submitted this 23rd day of March 2010.



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Attorney for Tyrone Ford

CERTIFICATE OF MAILING

I certify that on 03/23/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Michael C. Kinnie, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000; and (2) Tyrone D. Ford/DOC#310040, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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